

Legal Theory and Practice

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Even a cursory reading of the course catalogues of most American law schools indicates that the number of "theory" courses available in the curriculum has increased. So, too, has the number of faculty members with advanced degrees in academic fields. Among those without advanced degrees, moreover, the commitment to interdisciplinary scholarship and instruction appears to be at an all time high. The (more or less "high") theory invasion has not been restricted to electives and advanced courses. Discussions of justice, efficiency, interpretive theory, and the sociology of knowledge are now familiar in basic torts, contracts, procedure, constitutional law, and criminal law courses.

Recently, claims on behalf of the role of theory in the law school classroom have come under attack. The critics do not deny that some theory is valuable. They deny, however, that much of it is relevant to the careers that law students are likely to pursue. They also have doubts about the balance currently being struck between the legal and the theoretical components of the curriculum.¹

My remarks are intended to defend the teaching of theory in the core of the law school curriculum. It is not enough that theory be set aside for an advanced course in jurisprudence or a seminar on problems of race and gender in the law. Considerations of efficiency and justice are not just windows through which we can assess or reform existing law, they are important standards of law. Indeed, the view that such standards are not law is itself a theoretical claim about the nature of law. The truth of that claim cannot be presupposed by the law school curriculum. Part of the point of the curriculum is to provide students with the framework and skill for evaluating its truth.

Kant famously held that theory and practice are inconceivable without one another. He may or may not have been right. Nevertheless, legal theory is both instrumentally and intrinsically valuable. It is instrumentally valuable insofar as it contributes to or enhances actual legal practice. It is intrinsically valuable in two ways. First, it is an aspect of the integrity of

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1. See, e.g., Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993) (especially Harry T. Edwards, *The Growing Disfunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993)).

law as a field of *study*. Second, it is an aspect of the integrity of law as a *social practice*.

I. PRELIMINARY DISTINCTIONS

Before explaining and defending these claims, I want to draw three distinctions. First, I do not mean to defend the teaching of legal theory as such. Surely we want to distinguish between theory done well and done poorly. Poorly taught, theory can only harm all concerned. Bad theory taught poorly is positively deadly. Not surprisingly, I want to defend good theory taught well.²

The argument for theory should ultimately defend not only the teaching of theoretical or academic courses, but should also explain why some kinds of theory are relevant to the law school curriculum and some are not. It may appear that we need no elaborate defense of theory in the classroom in order to know why a jurisprudence course would make sense whereas a course on field theory in physics would not. One thing a theory does, however, is enable us to see why the easy cases are easy and the hard ones are not. The hope is that a principled defense of theory could enable us to determine whether there is a difference, from the point of view of their place in the curriculum, between a course that explores theories of interpretation as applied, for example, to the corpus of William Shakespeare and a course on William Shakespeare's corpus.

Finally, there is an important distinction between explanation and justifi-

2. In fact, the quality of theory in the classroom is bound to be mixed. In the two areas of theory with which I am most familiar, philosophical and economic theory, there has been a marked improvement in both the depth and sophistication of economic theory but an overall decline in the quality of philosophical theory. Interestingly, in the 1970s, most of the philosophical literature referred to in law schools and in law review articles cited John Rawls's, *A Theory of Justice*, and Robert Nozick's, *Anarchy, State and Utopia*, in addition to the usual suspects, e.g., Marx, Kant, and the utilitarians. Most of these discussions were speculations about these theories of justice (liberal and libertarian) and their implications for law. Many of these discussions were extremely illuminating and not just about the legal implications of these philosophical theories. Some made substantial contributions to the philosophical literature itself.

The situation has deteriorated since then as the kinds of theories that have struck law professors as relevant to their research and teaching have expanded to include core areas of philosophy like metaphysics, philosophy of language, epistemology, and philosophy of mind. In addition, many law professors have embraced aspects of the continental philosophical traditions. Even a cursory glance at the laundry list of philosophers referred to in the current literature—Rawls, Nozick, Dworkin, Marx, Bentham, Mill, Quine, Wittgenstein, Dewey, Davidson, Sellars, Rorty, not to mention Derrida, Hegel, Foucault, Heidegger, Gadamer, and, of course, Nietzsche—would suggest that even a professional philosopher trained in *both* the analytic and continental traditions would have a hard time keeping up. I know I cannot. It is one of the great but indefensible conceits of the modern law professor that he claims a competence over a range of philosophical issues that no professional philosopher would claim for himself. The net effect has been a lot of very inferior scholarship and a series of doubts raised by practicing attorneys and judges about the teaching of theory in the classroom. I do not mean to defend theory against these charges.

cation. An explanation normally calls for some sort of causal account of a state of affairs. A justification normally calls for a defense of it. Many of those who lament the extent to which theory is taught in the law school curriculum offer explanations of the phenomenon that are often cynical. Rather than asking whether it would make sense to have a large theoretical component in the law school curriculum, they point to a set of unfortunate events that have led to law schools being overcome by theoreticians. My purpose is to provide an outline of a defense of legal theory, not an explanation of its rise to prominence. In fact, I do not believe that theory is particularly prominent in law schools generally. My argument is that, at least as an ideal, an aspiration, it should be.³

II. THE RISE OF THEORY

Though the central concern of this piece is justificatory, it may be illuminating to look at some of the explanations of the rise of theory in the classroom that have been offered. We can distinguish among at least four explanations. I refer to these as: (1) elite school mimicking; (2) tenured failed academics; (3) monopoly rents; and (4) Legal Realism.

Elite school mimicking: The basic idea here is that theory is a large component of the curriculum at elite law schools. If the goal is attainment of elite law school status, then it is necessary to do what they do at elite law schools, that is, teach a lot of theory. There are many variants on this thesis, some of which are very subtle and nuanced. Is the teaching of theory a component of being an elite law school? Is it part of the causal explanation of how the schools have become elite? Does one try to emulate elite law schools in this regard in the hope of thereby becoming elite? Or does one emulate teaching theory in the classroom on the theory that elite law schools have information that other law schools do not about what is the right sort of thing to do (and that is why they are elite), in which case one emulates the elite law schools because teaching theory is the right thing to do—as evidenced by the fact that elite law schools do it? And so on.

We can skip the niceties. At best, this line of argument might explain why most law schools have increasingly chosen to include theoretical components in their curricula, but it does not explain why the elite institutions have done so. So it is an incomplete explanation at best.

Tenured failed academics: The basic idea here is that the 1970s and 1980s were very difficult times for academics pursuing work in academic disciplines, particularly history, philosophy, sociology, and literature. As a result, many Ph.D.s did not secure academic employment in the fields in

3. As we shall see, some causal explanations of the rise of theory in the classroom imply a justification. Thus, even if explanations and justifications differ, it does not follow that something that is a good explanation can never serve as a good justification.

which they were experts, and many of those who did secure employment did not obtain tenure. They were forced to look for work in other fields, and their records of academic achievement relative to other applicants to law school were extremely good. So many of those who applied to law school were accepted at the very best law schools: exactly those law schools one would have to attend to secure a position in academic law. Once having graduated law school, these individuals went on the job market in law teaching where their academic credentials again put them in an advantageous position relative to others. They attained jobs, wrote enough to be tenured—which in a law school is hardly a demanding requirement—and then their true colors emerged. Once their employment was secure, these failed academics reverted to their real love: the academic disciplines in which they were trained. The law reviews and classrooms were then saturated with the works and thoughts of this group of failed academics. These are people with no real love or respect for the law or the teaching of it. Law teaching is an instrument of security, enabling them to pursue their first love.

The subtext of this argument, of course, is that the current state of affairs in law schools is somehow deplorable or at least lamentable. The extent of theory in the classroom reflects a kind of cynicism about law as a field worthy of study and reflection. As a result, this explanation (which I am putting in a somewhat caricatured form) is itself cynical. It is also unsatisfying.

It is incorrect that most of the theory being taught in law schools or written about in journals is the work of failed academics. It was not true in the 1970s, and it is not true now. The academics I know from other disciplines who currently hold their appointments in law schools could hardly be characterized as people who failed in their academic (i.e., nonlaw) fields. Here is a very incomplete list of some of the people who have been major contributors to legal theory in law school, who possess a Ph.D. but not a J.D., and who have also had careers in other academic departments: in economics—William Landes, Oliver Williamson, Alvin Klevorick, A. Mitchell Polinsky, Robert Cooter, Steven Salop, and Steven Shavell; in sociology—Stanton Wheeler; in philosophy—David Lyons, Jeremy Waldron, and myself. One would be hard pressed to argue that these individuals are in any sense failures in their own fields. The list of individuals who first secured Ph.D.s and then went on to secure J.D.s is at least as impressive.⁴

4. In fact, the bulk of theory is taught by individuals who have never been advanced graduate students in other academic fields. This has always been, and continues to be, the case. The same is true about the scholarship in law journals. If one wanted to lament the teaching of theory in the classroom and its omnipresence in the journals, one would want to point one's finger not at failed academics from other disciplines, but at the amateurism and conceit of law professors. Someone who wanted to press this line of attack would find me to

If truth be known, many individuals who did not secure academic employment upon securing Ph.D.s and others who did not receive tenure were by no means failures. They were simply unlucky. And of those who then went on to law school, especially from among the second group, very few actually went on to law teaching. Many were turned off to academic life. Many were so disgruntled that they did not do as well in law school as they expected or hoped. Indeed, some law schools, like Yale, which at one time admitted quite a few Ph.D.s into the first year class, have consciously changed that policy, disappointed with the performance of such individuals as law students.

Because I argue that theory is itself integral to legal education, I would reject the portfolio or comparative advantage view of theory in the curriculum. On this view, some law schools should have lots of theory courses and materials, others should have less, and still others, perhaps, none. This may be because some schools have a comparative advantage when it comes to teaching theory, or because it is better for the legal profession that it have a diversified portfolio of curricula among which prospective consumers (i.e., students) should be free to choose. I believe that theory should be taught and integrated into the curriculum everywhere. How much theory—beyond the threshold—and at what level will depend on a variety of factors: for example, quality of students, faculty, local or regional needs and responsibilities. There is no good argument for theory that is compatible with it being optional.

Monopoly rents: Law schools have a monopoly on access to a valuable and potentially lucrative profession. This puts them in a position to secure

be an ally. Too much of what is taught and published in law journals is embarrassing, almost nonsensical. Trained lawyers and law professors have a truly remarkable skill in being able to assimilate an enormous amount of material from a variety of fields which they then shape and mold into intelligent, often persuasive, legal arguments. I have never seen anything like this skill duplicated in any other field with which I am familiar: e.g., philosophy, political science, and economics. Part of this is a credit to the expansive interdisciplinary education in law schools—a practice that I am defending. The great mistake of the legal academic is her confusion of this “mile wide/foot deep” understanding of an enormous range of materials with genuine knowledge of a field.

I am torn. I am here to defend the teaching of theoretical materials in the core of the law school curriculum, yet I lament, perhaps more than anyone, the embarrassing level of amateurism that pervades the industry. I resolve the dilemma optimistically. First, there is no denying that the quality of interdisciplinary work in some fields of study, both by those who are formally trained in the relevant academic discipline and those who are not, has improved and is very good by any standard. The best example of this is the field of law and economics. Legal history is another example of a field that is generally quite good. The level of scholarship in the broad field of law and society is also pretty good, and part of the reason for that is that there has been an interdisciplinary professional society in that field for quite some time. The worst offender is, I fear, law and philosophy. Everybody thinks he's a philosopher. Unfortunately, just because it is easy to be obscure does not mean that it is easy to be a philosopher. There are a number of good people working in the area of law and philosophy, not all of whom have philosophy Ph.D.s; but there is an awful lot of nonsense in the journals, not all of it written by individuals without Ph.D.s in philosophy.

rents. Students can become lawyers only by attending law school. They are captives (within the limits defined by the availability of equally or more attractive career options) of law schools. Law schools take advantage of this situation by indulging their intellectual interests. Indulgence is expressed in the teaching of theoretical courses in literature, philosophy, history, economics, and sociology.

The power of the monopoly depends on the alternatives and the relative entry costs. Law school applications are apparently declining, especially in relation to applications to business schools. This suggests a reduction in the strength of law schools' position. If that is so, one would expect to find some reduction in the extent to which law school faculties will indulge themselves in the theoretical turn. We will have to wait and see what happens.

There are other problems in this line of argument, however. It is certainly true that monopolies can capture rents, and that in this case rents can be thought of in terms of indulgences. Still, as a monopolist, I would be unlikely to indulge myself in my teaching, as opposed to, say, taking time off for research. In other words, the typical academic lawyer might indulge himself by reducing his teaching. Of course, if one could indulge in several areas, but only a bit in each, a rational academic would first reduce his teaching load, then teach what he wanted. That is fair enough. The problem is that if professors were to indulge themselves in teaching, my guess is that they would teach a whole lot of courses that are not currently taught in law schools. I would teach a course on sports, another on pop culture, and my core course would be on the philosophy of rock and roll. I certainly would not teach courses on jurisprudence and tort theory—at least not that often.

More important, the argument concerning monopoly rents suggests that the courses offered are mere indulgences with no independent warrant. This is implausible. For while students might be able to do little about breaking up the monopoly, the profession itself could send clear signals that it did not like the law schools' product. Some members of the profession have sent such signals,⁵ and others probably scratch their heads from time to time after reviewing a stack of transcripts from Yale law students. But the profession as a whole has not objected to the product it is purchasing. That product receives more of an education in legal theory than any preceding generation, and still it succeeds. It is foolishness to think that lawyers succeed in spite of their education. They succeed, in part, because of it. There is no reason to apologize for the modern law school curriculum (at its best). There is a reason, however, to defend it—not in a defensive mode, but in an explanatory one.

5. See, e.g., Edwards, *supra* note 1, at 34.

Legal Realism: Perhaps the best explanation of the extent to which legal theory figures in the curriculum traces the current state of affairs to the Legal Realist revolution in legal education, which began in the 1920s and 1930s at Columbia and then at Yale. The Realists rightly complained that law could not be taught as an autonomous discipline. To do so would be to teach students “paper” rules—rules that have no *impact* on the decisions judges reach, either causally or justificatorily.

In order to teach students how to become effective lawyers, law schools have to embed the paper rules in the world. They have to teach students the sort of things that actually lead judges to reach the decisions that they do. If a lawyer wants to influence a judge to decide a case one way rather than another, then a lawyer would need to explain to a judge what the real-world implications of different decisions are likely to be. Thus, a well-trained lawyer needs to know something about how judges reach decisions and the institutional consequences of those decisions. That requires the teaching of some sociology, economics, history, and perhaps psychology.

Legal theory is essential to legal education. Without it, law schools cannot train successful lawyers: lawyers who can usefully advise their clients and successfully influence judges and other officials.

In this view, the move away from seeing law as an autonomous body entails the teaching of legal theory. Which legal theory? Whatever theory is necessary to develop the skills of a successful lawyer. Perhaps what we are noticing in law schools now is not something altogether new. Rather, it is the natural evolution of the Realist revolution in legal education. The difference is that the quality and depth of the theory has increased, the kinds of theory that are viewed as relevant to legal practice have increased, and the technology of transmission from academic discipline to law has improved.

Which theoretical disciplines are relevant to good lawyering is a matter of controversy. Legal realists were skeptical, for example, about the normative force of paper rules. They did not believe that legal rules justified or warranted legal decisions, so they did not see the importance of normative disciplines like philosophy. In their view, philosophy would not contribute to better legal practice. That view itself presupposes an account of the nature of law. And that account, of course, is a matter of controversy, precisely the sort of controversy that is the subject matter of law school jurisprudence courses.⁶

6. We shall have occasion to develop this argument a bit further in conjunction with one of the arguments in defense of legal theory in the classroom: namely, its role as an element of the integrity of law as a field of study.

III. INSTRUMENTAL AND INTRINSIC VALUE

Legal theory is not only an integral component of the modern law school curriculum, it is an important and valuable component as well. We can distinguish between instrumental and intrinsic value. Legal theory is instrumentally valuable insofar as it contributes to better lawyering. Legal theory is intrinsically valuable insofar as it is essential to one's understanding of law as a field of study and as a social practice.

Over the course of their careers, graduates of law schools can enter a variety of professions. Consider three possibilities: lawyering, judging, and legislative or agency decisionmaking. Legal theory can improve performance in each of these areas. Presumably, a legislator or agency decision-maker wants to fashion rules that have desirable consequences. This task requires a defensible conception of justice and social welfare and a knowledge of how institutions work and the ways in which decisions are likely to impact them. So one would need a moral and political theory, a theory of institutional organization, and a theory about the ways in which decisions affect the behavior of persons and institutions.

Judges need a similar set of theoretical constructs, and insofar as lawyers must advise clients about what a judge is likely to do, lawyers, too, must have a working knowledge of institutions, the demands of justice, and the like.

I do not want to make too much of this claim on behalf of legal theory. I am not sure how one would go about determining whether legal theory has had a positive effect on the practice of law. What does seem uncontestable, however, is that lawyers trained in a variety of interdisciplinary fields are better able to develop creative and novel legal briefs that move the law in new directions.

The most compelling arguments for legal theory, however, do not rely on its instrumental value. Rather, they depend on the role legal theory plays in the integrity of law as a field of study and as a social practice.

The claim that the teaching of theory in the classroom needs a justification implies that some component of the law school curriculum does not. Justifications are offered to answer doubts, questions, and concerns: some events call for justification—apparently others do not. What approach to teaching law or component of the conventional law school curriculum requires no justification? The usual answer is “teaching cases”: that is, learning law through the case method. Why cases? Because cases teach students what the law—the black letter of the law—actually is. But this is surely wrong. If the goal of legal education is to teach law students the black letter of the law, we should be teaching from Gilberts, not cases. Cases already presuppose that we can see connections among arguments in the light of general principles. These principles enable us to see that the legally accepted reasons offered in one case are connected to the kinds of reasons that are appropriate to other cases. They are as much a matter of

the law as are the black letter rules that one finds in Gilberts and horn-books. At least that is one important jurisprudential view about the nature of law as a field of intellectual inquiry. Let's call the view that such principles are part of the law "Dworkinian jurisprudence."

We can contrast Dworkinian jurisprudence with the legal realist view that the black letter of the law plays no causal role in the explanation or the justification of judicial decisions. We can contrast both views with the position of legal positivists that the binding legal norms and the principles of interpretation sometimes uniquely justify the outcomes in particular cases, but sometimes do not. In one view, the black letter law is the law; the principles that justify these rules are also part of the law. In contrast, legal realists treat neither the black letter rules nor the principles as part of the law. And there are numerous positions in between. If one were to study *the* law, what is it that one would be studying? The black letter? The principles? The relevant social scientific theory that provides the best explanation of the judges' decisions? A coherent conception of a law school curriculum must contain courses that address such questions. Theory is necessary to the integrity of the study of law.

Legal theory is also necessary to the integrity of law as a social practice. Law is an expression of the coercive authority of the state. Even if the state never had to arrest anyone or send a person packing to prison, even if it never had to transfer resources forcefully from one party to another in order to enforce a claim to recovery in torts, its rules and principles would be coercive. So, law is coercive quite apart from its rules being enforced coercively. It is coercive merely because it sets limits within which individuals may permissibly act. It limits liberty in just this way. Moreover, it sometimes exercises its power to incarcerate or to compel wealth transfers: to take resources from one person and redistribute them to others. It may do all this in the name of freedom or security or wealth maximization, or whatever. The point is that law must do this in the name of some principle that would justify its doing so. It is, of course, a very different question whether the claim law makes to legitimate authority is itself warranted, and if so, to what extent.

It is not necessary that one live an examined or reflective life. Many people can presumably go through their lives happily without once reflecting on what they do, its value, or the contribution it makes to their lives and to the lives of others. I cannot here defend the value of living an examined life. I do want to make it clear, however, that the study of legal theory is an essential component of the examined life of a lawyer, especially once one realizes that being a lawyer is not like being a plumber, however valuable and interesting that line of work may be. It is not like being a baseball player, however lucrative that line of work may be. A lawyer stands between the individual, her client, and the coercive machinery of the state. Often the lawyer is an agent of the state. Other times the

lawyer seeks to have the machinery of the state employed for the purposes of coercing others or forcing wealth transfers. A lawyer who never put herself in a position to reflect meaningfully on what it meant to be a lawyer in this respect shows little respect for the power of the law and even less for herself.

If proponents of so-called critical theory are right and the law is radically indeterminate, and any answer is as good as any other, the one chosen being the reflection of the judge's ideology, should this not affect the way in which a reflective lawyer looks upon what she is doing—and not just strategically? Does this radical indeterminacy not undermine law's claim to authority and lead one to worry about the role one plays as a lawyer in enforcing arbitrary outcomes?

If assertions that such-and-such is the law are neither true nor false, but are instead mere expressions of attitudes of judges or lawyers, if the law lacks cognitive content in this sense, does this not lead one to wonder whether law's claim to authority is grounded in fact? If it is not, is the lawyer no more than an instrument in a power struggle, not seeking to do right or justice, but using her skills to help one side rather than another when neither side has a real claim in law?

If feminist theorists are correct and the law systematically reflects a male conception disadvantageous to particular genders and races, would this not be a source of concern to a student contemplating a life in the law?

The point is not that law is radically indeterminate, lacking coherence, or that it is arbitrary, lacking objectivity, or that it reflects existing power relations and hierarchies in a way that does little more than entrench the status quo. I, for one, reject the claims of indeterminacy, subjectivity, racism, and entrenchment. Instead, the point is that students, if they are to become reflective practitioners, need to be given the tools necessary for self-reflection. These tools are not presented in Gilberts or even in a professional ethics or responsibility course. They are presented in theory courses that explore the work of individuals whose life work has been to determine the extent to which the law, or particular bodies of it, can be understood as arbitrary or coherent, as unprincipled or as reflecting a set of principles (e.g., justice or efficiency) that are themselves independently defensible or not.

This defense of teaching legal theory applies to a legal history or sociology of law course as much as to a jurisprudence or a law and economics course. These courses may produce better, more able lawyers, capable of writing more sophisticated briefs, extending the frontiers of the law. More important, these courses produce better lawyers because they challenge students to examine critically what it means to be a lawyer in a liberal political democracy. They produce better lawyers because they produce reflective as well as able ones. To miss this contribution of theory

to the practice of lawyering is to miss its deepest and most important contribution.

IV. TORT THEORY AND PRACTICE

The teaching of theory in the classroom is something of both instrumental and intrinsic value. Theory can contribute to better practice. In that sense it is instrumentally valuable. Theory is also a component of a reflective understanding of legal practice. In that sense it is a component of the examined professional life. In this and the final Part of this essay, I will develop in some detail examples that sustain these claims using illustrations from tort theory.

We begin with an example of the ways in which tort theory can contribute to better tort practice. Arguably, one purpose of the Restatement of Torts is to improve existing tort practice.⁷ One way of doing this, presumably, is to more appropriately fit liability rules to various bodies of tort law. So someone in the working group on products liability law, for example, might want to know whether the goals of product liability law are better served by a rule of strict or fault liability.

This kind of analysis requires first a conception of the goals of tort law. Economic analysts of tort law are committed to the view that the primary goal of tort law is to reduce the costs of accidents. It is well known that there are distinctions among different kinds of accident costs. It is also true that there are costs of reducing the costs of accidents. It makes no economic sense, however, to spend more resources to prevent accidents than the accidents themselves cost. Tort law should not aim to reduce accident costs at whatever cost. Instead, tort law should seek to minimize the sum of accident and accident avoidance costs.

It may seem arbitrary to someone who is not already immersed in economic analysis that the goal of tort law should be understood in this way. There is, however, a reasonably persuasive argument for this conception of tort law's goals. Let's imagine a case in which injurer and victim are the same person rather than one in which they are separate individuals. The question we now ask is how much investment in safety would it be rational for the injurer/victim to make? In thinking about this question, the injurer/victim takes note of the fact that she will bear both the costs of whatever injuries she incurs and the costs of preventing them. She cannot displace those costs on anyone else; they are hers alone to bear. The answer to the question is that a rational person would invest in safety up to that point at which the next expenditure in safety is more costly to her than the cost of the injury she would otherwise receive but for that investment.

7. Of course, a restatement theoretically only states existing law. However, in doing so it can impose a kind of theoretical or principled unity on the field. This has a distinctly normative dimension.

In other words, if the injurer/victim has to spend \$90 to prevent a \$100 injury, she will do so; but if she has to spend \$110 to prevent the same injury, she will not. In the first case, investing in precautions saves her \$10; in the second, investing in precautions will cost her \$10 beyond the costs of the accident.

Now, if we assume that a community is just the conjunction of such individuals, then the collective decision regarding the social investments in accident prevention should reflect the decisions each individual would make. If it is not rational for an individual to incur prevention costs in excess of the costs of accidents, how can it be rational for a community of such individuals to do so? If it is not—and it does not appear to be—then it makes perfectly good sense to suppose that legal institutions concerned with accidents and their costs should be arranged in ways that minimize the sum of accident costs and the costs of avoiding them.

This is a plausible argument for conceiving of tort law in, broadly speaking, economic terms. It is an argument for identifying the primary goal of tort law with minimizing the sum of accident and accident avoidance costs. Once this goal is in place, the next step is for the economist/lawyer to inquire into which rule of liability is best able to promote the goal in the area of product liability law.

Tort law distinguishes between two general liability rules: strict and fault. In fault liability an injurer will not have to shoulder the costs her activity imposes on others unless the harm that results is, in a suitably defined way, her fault. Under a rule of strict liability, an injurer will be asked to bear all the costs her conduct imposes on others whether or not she is at fault.

These rules seem very different in an obvious way. Under a rule of fault liability, an individual will be allowed to displace some of the costs of her activity onto her victim. That is, the victim will bear some of the costs of the injurer's activity (costs the injurer would have had to bear herself were she both injurer and victim), namely, those costs that are imposed without fault. In contrast, under a rule of strict liability, the injurer bears the entire cost.

In spite of this difference, both fault and strict liability rules can be implemented in ways that lead to the desired level of investment in accident cost avoidance. A rule of strict liability requires that injurers bear all the costs that their conduct imposes on others. In economic jargon, we would say that a rule of strict liability requires each actor to internalize his externalities. That means that the actor is required to treat the costs that his activity imposes on others as if they were costs he imposed on himself. A rule of strict liability, in other words, takes an accident involving injurer and victim and forces the injurer to treat it as if it were an accident in which the injurer is both injurer and victim. An "injurer and victim accident" is made an "injurer/victim accident." We already know that a

rational injurer/victim will optimize his investment in prevention, and given the economic goal of tort law, that is precisely what we want him to do.

The argument for the efficiency of fault liability is somewhat more complex. Under fault liability, an injurer will be liable only for those costs of her conduct that result from her fault. This requires a conception of what it means to be at fault. Only then can we determine which costs of her conduct are hers to bear and which the burden of her victim. To be at fault is to act in an unreasonable manner. It is to impose risks on others that a reasonable person would not impose. If we assume that the activities in which we engage are certain to impose risks on others no matter what efforts we take to minimize the risks, we need to ask just how much effort is reasonable? Again the answer seems straightforward. We would not want individuals to spend more in reducing risk than the value of the risk itself. The value of the risk is equal to the harm it would impose, were the risk to mature, discounted by the probability that the harm will occur. Let's call this the disvalue of the risk or the expected value of the harm.

There will always be a reason to try to avoid this risk, but that reason will not always be compelling. It will not be rational to avoid the risk if the cost of doing so exceeds the expected value of the harm. On the other hand, a person who fails to take precautions when the costs of doing so are less than the expected value of the harm acts unreasonably. Actions that are unreasonable in this sense are *negligent*. An agent who is negligent in this sense is at fault, and, in the event that harm results as a consequence of her negligence, the victim's loss is her fault. This suggests that negligence is the failure to take cost-justified or efficient precautions.

The fault liability rule implies that injurers can displace the costs of their activities if those costs are not the consequence of their fault. But that is just what efficiency appears to require. An injurer who is at fault has failed to take cost-justified precautions. Holding her liable provides her with an incentive to take those precautions. On the other hand, a person who is not at fault has taken the relevant cost-justified precautions. There is no reason, therefore, to hold her liable. A rule of fault liability, then, creates just the right incentives. It encourages individuals to take all and only cost-justified precautions.

Rules of both strict and fault liability can be efficient. The problem, then, is to fit the appropriate liability rule to a particular body of law. I have outlined one way in which legal theory can improve tort law. The theory is economics, and the relevant practice is represented by the need to find appropriate rules of tort liability for products liability.

To be sure, I have not filled out the example in all its detail. I have not, in other words, established which particular formulation of which particular tort liability rule for defective products is required by considerations of efficiency. In fact, economist/lawyers are not in total agreement about that

matter. My reason for stopping here is different, however. Instead of establishing the efficiency of a particular rule of liability for defective products, I want to explore further the ways in which one's thinking about products liability law, for example, can be enriched by even more abstract theoretical inquiry.

We noted that considerations of efficiency support the general principle that individuals should internalize their externalities. Efficiency generally is incompatible with allowing individuals to displace the costs of their activities onto others. Suppose, however, that we shift our focus from economic theory to moral or political theory. Liberal political theory arguably is committed (at some level of abstraction) to principles of both equality and liberty (or autonomy).

Part of what it means to refer to institutions as liberal is that they aspire to express a conception of equality.⁸ Let's refer to the harms that result from accidents as misfortunes. Misfortune has costs, and our question is how the costs of misfortune should be allocated. Liberalism requires that those costs be allocated fairly, but what does equality or fairness require in the allocation of the costs of misfortune? One plausible suggestion is represented by the principle that each of us should bear the costs of our own activities. In economic vocabulary, no one should be allowed to displace the costs of their activities. So put, the principle has the ring of a tautology: if someone else ends up bearing the costs of one's activity, they turn out not be one's own costs after all. But the point is normative as well as conceptual: however we might fix which costs belong to whom, it is surely unfair that some should end up bearing costs imposed by others.

Let's refer to the claim that each person should bear the costs of her activities as the principle of fairness. What are the costs of someone's activity? When the rancher's cows trample the farmer's corn, what reasons are there for treating the resulting costs as costs of ranching rather than costs of farming? Is there a general principle for determining the costs of an activity? Whatever that principle is, it must honor the more general principle that individuals bear the costs of their activities. It cannot simply be a way of having injurers, for example, determine what those costs are. The notion of the costs of an activity must be, in a suitable sense, objective.

Tort law presupposes an account of what the costs of an activity are, but there is no natural notion that tort law can assume. Tort practice requires, but does not provide, such a conception. That conception itself is the product of *theory*. No merely arbitrary way of identifying costs will do; for an arbitrary conception may not support our belief that individuals should bear the costs of their activities. In this sense, legal practice is not only enhanced by legal theory; practice is, in essence, impossible without theory.

8. The remainder of my argument in this and the next Part are drawn from Jules L. Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. (forthcoming 1996).

And this is true whether one is moved largely by economic reasons or by considerations of justice.⁹

How are we to determine the costs of an activity? Any form of liberal political or economic theory must answer the question of where misfortunes properly lie in a way that satisfies the principle of fairness. It may be helpful to begin by identifying two extreme positions one might adopt. At one extreme lies a Hobbesian state of nature,¹⁰ in which all misfortunes are simply allowed to lie where they fall. Fortune is allowed full sway at every level. Of course, people might displace various misfortunes from themselves onto others—displacing their hunger by taking someone else's food, or injuring another while attending to their own wants. If they succeed in any such endeavors, the misfortunes now lie where they most recently fell. Even deliberate shifting can be thought of as the full reign of fortune, because whether someone is in a position to shift her losses to others is itself a matter of fortune, at least from the perspective of the new owners of the misfortune. They just happened to be in the wrong place at the wrong time.

At the other extreme lies the ideal of a perfect community in which all misfortunes are held in common. Whatever goes wrong, for whatever reason, all share in the costs. Hence the effects of fortune on particular persons are canceled entirely. Where the Hobbesian state of nature is a world of pure agency with no community, this world is one in which the search for perfect community abandons the idea of agency altogether.¹¹

Neither the world of perfect agency nor the world of perfect community has room for the idea that people should bear the full costs of their choices. If I injure you in the Hobbesian state of nature, it is your problem,

9. In some ways I have already met my burden by illustrating at least two ways in which legal theory contributes to legal practice. I am imagining, remember, that you are a member of the ALI's committee on the Restatement of Torts. It is not possible for you to determine which rules of tort liability should be fit to different bodies of the law without first having a conception of the point of tort law or its goals. For the sake of illustration, I have indicated how an economic conception of those goals can be made plausible, and once it is, how applying that conception would contribute to shaping one's thinking about the issue at hand. Arguably, the same would be true for a conception of tort law that understood its purpose to be enforcing a moral ideal such as corrective justice.

I did not stop there, however, for I wanted to illustrate that the relationship between tort practice and theory is deeper and more fundamental. It is not just a matter of arguing for a conception of the normative purpose of tort law and applying that conception to a particular body of law. Rather, my point is that the central concept of tort law is the concept of the cost of an activity. That concept does not come to us fully analyzed. Quite the contrary. It is the most central and least developed concept in tort law. The concept of cost is itself normative.

10. See generally THOMAS HOBBS, *LEVIATHAN* (1651).

11. The Soviet jurist Evgeny Pashukanis comes closest actually to endorsing such a view when he suggests that the idea of individual responsibility is a relic of a deformed social system, which will give way to a system in which problems are solved and losses made good as they come up. EVGENY B. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* (Chris J. Arthur ed. & Barbara Einhorn trans., 1978).

not mine. Whether through malice or indifference, people could take advantage of the efforts of others and displace the costs of their activities onto them. The world of perfect community is unfair in similar ways. If I injure you or fritter away my share of resources, I do not lose my place at the common trough. Costs imposed by the lazy, the vicious, and the self-indulgent must be spread no less than those that fall on the disadvantaged, the needy, or the injured.

The state of nature presents itself as a world of perfect agency. Yet it fails to protect agency because it does not leave only *mere* misfortunes (i.e., those that result from chance or fortune) where they lie; it does the same for misfortunes that one person creates for another, whether willfully or carelessly. It does not adequately tie the ownership of misfortune to agency. The converse is true of the world of perfect community. This time the problem is that rather than simply rectifying the unfortunate effects of circumstances, it does the same for misfortunes that people create for themselves, whether willfully or carelessly. Agency only makes sense if we can draw a line between it and mere fortune. Neither the world of perfect agency nor of perfect community has the resources to draw the distinction between what I do and what happens to me.

The state of nature allows one to impose on others costs that are the result of one's agency, and the state of perfect community allows one to impose costs that are the result of one's choices and indulgences. But this is too simple, because stating the problem in this way presupposes that we already have a conception of what the costs of a person's activities are. We might state the point differently, however, in a way that is more consistent with the theme of the argument. Instead of saying that the states of nature and perfect community unfairly allow individuals to displace costs that are in fact theirs, we might say that both are ways of specifying the costs of various activities. In the Hobbesian state of nature the costs of misfortune are costs of the victim's activity, not the injurer's—regardless of the nature of the activities in which each is engaged. In contrast, in the state of perfect community the costs of misfortune are costs neither of the injurer's nor of the victim's activities. They are everyone's to bear. Thus, rather than saying that the states of nature and perfect community violate the principle that one ought to bear the costs of one's activities, we might say that they represent particularly unattractive conceptions of what those costs are.

V. STRICT LIABILITY AND FAIRNESS

Some line must be drawn between those misfortunes that lie where they fall and those that properly belong to some other person. The most obvious place to look for that distinction, consistent with the emphasis on agency, is in a distinction between what a person does and what (merely) happens. That is, what is needed is a line between the sufferings that one

person *causes* another, and those that are merely the result of *chance*. The former must be compensated, the latter left where they have fallen. The resulting position is a regime of strict liability for accidents, which allows no further nonvoluntary wealth transfers. Basically, this is the libertarian solution.

In this way, libertarianism is one step removed from the Hobbesian state of nature. It seeks to capture the essential importance of agency in a way that is consistent with the liberal picture of fairness, something the state of nature cannot do. In the libertarian picture, the Hobbesian position serves as a default rule. Misfortunes do not simply lie where they fall. Instead, they lie where they have fallen unless they result from the causal agency of some other individual—in which case they are shifted to that person. So understood, the libertarian approach might be thought of as more accurately and adequately representing the ideal of pure agency.

The underlying view is this: what I do is mine, what is mine I own; what is not mine, I do not own. The costs my conduct imposes (i.e., causes) are the result of what I do and thus mine; I own them. I have to take back the costs my conduct has imposed on you, not so much to rectify your loss, but to give me what is mine. In contrast, if the costs that have befallen you are not the result of what I do, then they are not mine to bear. That does not automatically mean they are yours to bear instead; they belong to whoever's conduct caused them. If the misfortune that befalls you is your doing, you own it. If it is no one's doing, it belongs to no one. It is the result of chance, not agency. At this juncture, the default rule applies. If a loss is no one's property, just the result of chance, it must lie where it has fallen. The default rule is itself justified by a further appeal to agency: if by chance misfortune befalls you, it is yours, not because you deserve it, but because nobody else does. Shifting a loss to someone who did not cause it violates his agency. So it is yours just because it happened to you, just as your own body is yours. Chance plays an important role in both directions: whether or not my activity injures you may well depend on factors outside anyone's control, as will all of those natural facts not attributable to any human agency. For the libertarian, this way of dividing agency and chance is essential to the idea that people should bear the costs of their activities.

Put slightly differently, under the libertarian view only the consequences of agency can be the objects of justice; mere misfortunes—the upshots of chance—are not the proper objects of justice. If someone causes an injury to another, it is the result of agency, not chance. Thus, justice requires that the loss be returned to its proper owner. Sharing in the burdens of misfortune, in contrast, may be a matter of charity, but it is not a matter of justice. Sharing may be laudatory, but it is not obligatory.

Agency provides a way to express one's personality by making a mark on the world. One presumably owns one's own body and whatever one does with it. If I injure myself, I own my own injury; if I injure someone else, it is

as though I injured myself. In acting I create things and own my own creations.¹² In short, causation links agency with misfortune. If my body figures in a valid causal explanation of what happened, I am responsible.

But if causation is a good starting point, it does not get us far. For causation is everywhere. Ronald Coase and Guido Calabresi independently invented law and economics when they realized that both injurer and victim cause any injury.¹³ And of course the point is older than that. In the seventeenth century, Pascal made essentially the same point: "I have discovered that all the unhappiness of men arises from one single fact, that they cannot stay quietly in their own chamber."¹⁴ The injurer's role in the misfortune is obvious, as explained by advocates of strict liability. But the victim's role is no less real. In all but the most bizarre cases,¹⁵ the accident could have been prevented had the victim stayed home, taken a different route, or whatever. Thus, any injury is always a joint product, which must somehow be divided between the parties. If causation is made the basis for shifting losses, one can ask two questions in every case of injury. First, was the defendant the cause of the injury? Second, was the plaintiff? The trouble is, the answer to both questions seems always to be "yes." If we understand the causal question in terms of what would have happened but for the act of the defendant or plaintiff, we are likely to get the same result for every accident: both the injurer and the plaintiff cause the injury. Thus, we seem to find everyone liable for everything.

A tempting response to the problem of too many causes is to draw a distinction between causes and conditions. Thus, the libertarian might hope to claim that the injurer's act is the cause of the injury while the victim's is merely a *condition*. Both are necessary conditions, and so "but-for" causes. Only one is *the* cause, however, because only one seems to have crucially made a difference. In ordinary parlance we have no difficulty distinguishing between a match as a cause of a fire, and the presence of oxygen as a mere condition. In the same way, the libertarian might hope to

12. This seems to be the reasoning underlying Epstein's discussion of *Vincent v. Lake Erie Transp.*, 124 N.W. 221 (Minn. 1910). In *Vincent*, a ship owner left his boat tied to a dock during a storm, despite the dock owner's protests. The court conceded that the ship owner's actions were reasonable but nonetheless found him liable for the damages to the dock. Epstein suggests that liability can be explained by recognizing that if both ship and dock had been owned by the ship owner, the ship owner would have decided whether to risk the ship or the dock and would have been liable for the entire loss whichever decision he reached. Because the ship owner acted, he is liable for losses wherever they fall. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 153-58 (1973).

13. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Guido Calabresi, *Some Thoughts on Risk Distribution in the Law of Torts*, 70 YALE L.J. 499 (1961).

14. BLAISE PASCAL, *PENSÉES* 196 (W.F. Trotter trans., 1952).

15. See, e.g., *Tomaki Juda, et al. v. United States*, 6 Cl. Ct. 441 (1984). In this case the plaintiff was forcibly removed from his home in the Bikini atoll to allow nuclear weapons testing and was then returned when radiation levels were dangerously high. Presumably nothing the plaintiff could have done would have prevented the injury.

rescue strict liability by assigning losses to those who cause them rather than to the bystanders who are the mere conditions.

The distinction between causes and conditions can be of no real help to the defender of strict liability, however. Any account of causation that will be adequate to account for the distinction between causes and mere conditions in scientific and common sense explanations will, by virtue of that very adequacy, fail to solve the libertarian's problem about causation. For the purposes of assigning liability for loss to injurers under the libertarian conception of strict liability, legal causation requires uniqueness, while ordinary causal explanations do not. Any account of causation in nonlegal contexts needs to accommodate the fact that in ordinary discourse, the distinction between causes and conditions is contextual and malleable. For example, in some circumstances we might say that striking caused a match to ignite, taking the presence of oxygen to be merely a background condition. In other, less familiar, circumstances we might say that the presence of oxygen was the cause. And, for that matter, we can give different answers to causal questions about the same event, depending on our interests. The malleability of the distinction reflects the deeper fact that the two causal explanations are not incompatible. The person who claims that striking caused the match to ignite and the one who claims that it was the presence of oxygen do not disagree about causation. At most they disagree about what is interesting about the situation. And neither would declare the other's purported explanation irrelevant. Indeed, the relevance of both explanations enables Pascal and Coase to claim that causation is reciprocal.¹⁶

16. Some accounts of causation have sought to narrow its scope by reserving the name "cause" for those conditions that are not normal or typical. Put aside the difficulties any such account has in making sense of such banal claims as "evaporation causes cooling" or "eating causes weight gain"; it is of no use to the libertarian. What counts as unusual will often depend on the circumstances and the purposes of the inquiry. The unusual event may change depending on whether our interests in the causal inquiry are *explanation*, *prediction*, or *engineering*. If we want to control or engineer the future, we might look to conditions that would be of less interest if we sought instead to understand the past in a detailed way. Until we know what we are doing, we cannot identify causes.

The libertarian hopes to embrace strict liability as an interpretation of the idea that people should bear the costs of their activities. But any attempt to retrieve that idea by narrowing the range of causation faces a dilemma. If we concede that the explanatory interest we are pursuing in identifying causes is tied to our interest in assigning liability, we must first interpret the idea that people should bear the costs of their choices in order to know our explanatory purposes in establishing liability. But of course if we need an interpretation of the principle in order to distinguish causes from conditions, causation cannot itself provide the basis for an interpretation. Thus, causation provides no leverage in distinguishing plaintiff from defendant, unless we already have some other way to distinguish them. Alternatively, the libertarian might insist that liability be assigned on the basis of what would seem the most natural causal explanation quite apart from concerns about liability. This time, the problem is slightly different. If the advocate of strict liability appeals to some merely explanatory, predictive, or engineering interests, all connection between agency and liability is lost. The problem is not that we cannot distinguish among causes; the problem is

Perhaps the best known defender of the view that the costs of an activity should be understood in causal terms is Richard Epstein. At the same time, Epstein is aware that there are problems in distinguishing various causes, and suggests that we must narrow our notion of causation to include something less than all cases of but-for causation. Instead, Epstein insists we can look to the clear paradigms of causation the law recognizes. He focuses on force, fright, compulsion, and the setting of dangerous conditions as the paradigms of causal connection.¹⁷ If it is true that not every causal connection can suffice to ground ownership or liability, the question is why pick these as our paradigms? Why not use Bob Dylan's more comprehensive list? I might compete with you, beat you, cheat you, or mistreat you, simplify you, classify, deny, defy or crucify you, select you, dissect you, inspect you or reject you.¹⁸ All of these things are ways in which I could and often do cause harm to you. Some of these are even plausible grounds of liability, others not. Without an account of the obviousness of Epstein's paradigms, we are in danger of losing sight of what makes them obvious.

Again, the point is not that causation's reach cannot be appropriately narrowed, but that attempts like Epstein's turn out to be unprincipled—there is no rationale for them that does not beg important questions. Although the law may have no choice but to work outward from paradigm cases, Epstein's paradigms seem an ad hoc collection designed to reach his preferred result. Why not focus on other, equally paradigmatic actions: I might *embarrass* you into spilling your coffee, *goad* you into hitting someone else, or *humiliate* you. In each of these cases, we need far more detail in order to assess whether your injury would be compensable. With each of these examples, certain questions cry out for answers in establishing liability: Did you deserve humiliation? Are you too easily embarrassed or frightened? Should you have stood up in the face of my goading? We seem to need a conception of wrong or fault before we can determine ownership. But if we do, the appeal of strict liability as a way of drawing some line between what I do and what happens evaporates. For it is no longer the fact that I caused you harm that makes it mine, but something else.¹⁹

Another way in which the reach of strict liability might be narrowed while keeping it general is by holding people responsible not for all they

that we cannot do so in a way consistent with the idea of agency and the simple idea underlying strict liability, namely that there is a conceptual connection between what I do and the costs of my activities. Instead, agency must give way to predictability or, worse yet from the libertarian's point of view, (social) engineering.

17. Epstein, *supra* note 12, at 160-89.

18. See BOB DYLAN, *All I Really Want To Do*, on ANOTHER SIDE OF BOB DYLAN (Warner Bros. 1964).

19. The claim is not that there are no principled ways of drawing distinctions between but-for causes. My point is that any principled distinctions are also normative. What counts as a cause will depend on the consequences of the answer.

have caused, but only for the *intended* consequences of their actions. This approach looks promising, because those who intend to frighten, force, compel, or set dangerous conditions plainly differ from those who are frightened, forced, compelled, or unwittingly walk into dangerous conditions. It also has a certain natural attractiveness, as evidenced by the way children often defend themselves against charges of carelessness by saying "but I didn't mean to."

The naturalness of such a suggestion aside, its application would be counterintuitive at best: if I intend to hit you in the head, but instead hit you in the shoulder, surely I should not be entirely relieved of liability, or your injury treated no differently than it would be were you hit by a bolt of lightning. The suggestion has a more serious problem: limiting liability to intended consequences undermines the idea that liability is supposed to express, namely that people should bear the costs of their actions. For it effectively says that each person gets to decide what will and will not count as a cost of her activity. I determine the intended consequences of my conduct; after all, they are the consequences I intend. I can be liable only for them. Rather than being justified on the grounds that it expresses the idea that one should bear the costs of one's activities, this suggestion is instead a way of determining what those costs are—and a normatively unattractive way at that. For the intuitive idea is surely that people should bear the costs that their activities *impose* on *others*; it is not the idea that they are free to determine what those costs are.

VI. COSTS AND FAULT

Measurement of such costs requires some independent criterion. How can the costs of activities be measured? The most plausible answer can be found in the fault system. Instead of supposing that the duty to repair is a matter of causal relations or the crossing of prior natural boundaries, the fault system recognizes that the boundary between persons can only be understood in terms of our duties to each other. Thus, its inquiries are normative, not scientific (or folk-scientific). It narrows the scope of liability for harms caused to others by imposing a requirement of reasonable care. So long as I am careful, I am not liable for harms that I cause you. Those misfortunes are yours, just as though they had been caused by some natural event. If I am careless, then I am liable for whatever harms I cause you—those misfortunes are mine; they are costs of my activity that I must bear. The whole point of the fault system is that when I am careless I may own more than the intended consequences of my actions. Hence the duty to repair.

Drawing the boundaries between us in terms of the fault standard solves the problem of determining what counts as the costs of my activity. The fault system acknowledges the importance of concepts like control, agency, and choice. But those concepts only work in concert with substantive

judgments about why various activities matter to us and about the ways in which they do. That is, the fault system requires a substantive political theory. Indeed, because there is no natural feature to mark such boundaries, the fault system cannot help but make judgments about the importance of various activities.

In a liberal regime, the fault system aims to treat the parties as equals, protecting each equally from the other and granting each a like liberty. To protect both liberty and equality, the system must suppose plaintiff and defendant to have both liberty interests in going about their affairs and security interests in avoiding losses caused by the activities of others. The amount of risk to which you can faultlessly expose me depends *on what you are doing* and on the *kind* of harm that might eventuate. The fault standard invokes the idea that you and I have duties to one another. We can, if we like, put this in the libertarian's vocabulary of boundary crossings, as the claim that each has a duty to repair should they cross the other's boundaries. If we use these terms, however, two caveats are required. First, such a duty presupposes independently established boundaries, whereas the whole point of fault is to help define those borders. The boundaries between us are normative, fixed not by space but by the scope of the duties we owe one another. Second, I might violate my duty and thereby "cross" my own boundary—for example, by failing to exercise reasonable care—yet fail, through the good fortune of us both, to cross your boundary if my lack of care causes no harm to you. That is, there is a moral space between our boundaries, where fortune lurks. Crossing my own boundary does not entail that I thereby cross yours.

My crossing your border requires not only that I fail to meet my duty to you, but that in doing so I harm you as well. Invoking the importance of fault does not require giving up on agency or causation. On the contrary, the fault system lets us see why agency matters at all. Liability depends on my being an agent, capable of acting in keeping with my duties. Were I not an agent, I could neither discharge nor fail to discharge any duty to you. The fault standard also explains why causation matters. Causation turns my failure to discharge my duty to you into a crossing of your boundary. Without fault, causation does not signify a boundary crossing; without causation, crossing my boundary does not mean I have crossed yours.

Most important, while the concept of fault is understood in terms of reasonable care, the concept of reasonable care takes into account not just the relevant liberty and security interests of the parties, but the relative *value* of the activities in which they are engaged. The measure cannot be just their evaluation of those activities, but must, in some sense, be the value those activities actually have. This last point requires further elaboration.

To see the way the importance of various activities enters into the fault system, think of the fault standard as dividing the risks of injury between

plaintiff and defendant.²⁰ When an accident occurs, the fault system assigns the misfortune to the defendant if negligent, otherwise to the plaintiff. If all of the risk were to lie with the defendant—strict liability in other words—the defendant would always act at her peril. If all the risk were to lie with the plaintiff—holding the defendant liable only for intended consequences—the plaintiff's security would be hostage to the defendant's action. Because neither extreme treats liberty or security interests equally or fairly, neither alternative is acceptable as a way of giving expression to the liberal ideas of fairness or equality. The fault system solves this problem by supposing that the dividing line must be somewhere in between. Establishing the line depends on the particular liberty interests and security interests that are at stake.

For example, the liberty to drive without brakes is not sufficiently important to allow others to be exposed to injury from a car that is unable to stop in a timely fashion. In contrast, the interest of a person with an eggshell skull in being able to go out is too important to make him bear the full risk. Yet other examples, empirically like the eggshell skull, are treated differently. By ignoring Pascal's advice and going out, the eggshell skull makes the activities of negligent people costlier, just as the person who walks on railway tracks does. Yet the defendant is liable for the full extent of the eggshell's injuries, but not the trackwalker's. Although each would be fine if nobody else were careless, in the trackwalker's case, a rule of contributory or comparative negligence is applied. This rule limits the plaintiff's recovery if his activity made the injury more likely or more costly, even though there would have been no injury at all had the defendant exercised appropriate care. These are standard examples, so familiar that their presuppositions are hidden. They depend on substantive, though familiar, judgments about the importance of various liberty and security interests. They also provide models through which other activities get classified.

Is carrying out one's perceived religious duties treated as the equivalent of having an eggshell skull, or as the equivalent of walking on railroad tracks?²¹ The only way to answer such a question is to defend a substantive, if controversial, conception of the role of religion in our society. A general rule of contributory negligence requires plaintiffs to mitigate damages. Yet if someone fails to mitigate on recognized religious grounds, the defendant may well be liable for the full amount.²² This is a reflection of

20. The risks being divided are always risks of particular injuries. *See infra* text accompanying notes 21–23.

21. *See* *Meistrich v. Casino Arena Attractions*, 155 A.2d 90 (N.J. 1959) (sending questions of contributory negligence to trier of fact).

22. *See* GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* 46–52 (1985) (arguing that failure to mitigate damages is often justified as reasonable, despite implications of Establishment Clause).

the idea that the reasonable person would give more weight to certain religious convictions than to saving a negligent defendant money. Yet if the plaintiff fails to mitigate for other reasons, however deeply felt, damages are reduced accordingly. In other words, it is not the depth of the religious convictions that matters, for that would not distinguish religious conviction from other beliefs as a defense against failure to mitigate. Rather, what matters about religious beliefs is connected with a view of the way religion matters to people.²³ Not all sincerely felt religious beliefs can be accommodated within such a model; tort rules that seek to accommodate religion in this way cannot pretend to be *neutral*.

Again, rescuers are allowed to expose themselves to risks that would normally preclude recovery from their injurers. Although the special treatment accorded rescuers is sometimes described in terms of foreseeability,²⁴ a more honest way of looking at the special treatment accorded rescuers supposes their activity to be important enough to make them bear proportionately less risk.²⁵

The claim here is not that these cases invariably strike the balance correctly. Rather, it is that implicit in the fault system is the need to come to an understanding of the substantive value of various activities, their importance to us in a liberal society, and the ways they matter to us individually and collectively. Of course, neither judges nor juries normally think of themselves as engaged in an inquiry into the importance of various activities. Instead, they ask what a reasonable person would do in such circumstances, defining a reasonable person as one with enough foresight to see what is likely to happen and one who acts with appropriate regard for the interests of others. But the construct of the reasonable person incorporates answers to questions about which things matter and how they matter—we might even say that the reasonable person embodies them. Similarly, judges sometimes appeal to what is customary or conventional. This too reflects implicit judgments about the importance of various activities. Provided that background conditions are otherwise fair, these considerations enable people to take the costs of their activities into account by making those costs visible. In circumstances in which almost everyone

23. Such an account would presumably offer some explanation of why religious beliefs are typically deeply felt. But it is not the depth of the feeling that counts.

24. As Cardozo put it in *Wagner v. International Ry. Co.*, 133 N.E. 437, 437 (N.Y. 1921), "Danger invites rescue."

25.

When one risks his life, or places himself in a position of great danger, in an effort to save the life of another, or to protect another, who is exposed to sudden peril, or in danger of great bodily harm, it is held that such exposure and risk for such a purpose is not negligent. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons.

Peyton v. Texas & P. Ry., 6 So. 690, 691 (La. 1889).

engages in the same activities, and all are equally likely to be both plaintiff and defendant, a customary activity rule may be a reasonable proxy for a substantive examination of the interests that are at stake. But that is because in such circumstances everyone is engaged in the same activities and so has the same liberty and security interests in relation to them.²⁶

The same considerations that support the fault system and argue against the intended consequences thesis explain why the fault required for liability in torts must be *objective*. Because fault is supposed to measure the costs of activities fairly and across individuals, it cannot be understood subjectively in terms of good faith efforts at care. To do so would create yet again the problem that faced strict liability for the intended consequences of actions: it would make each injurer the determiner of her exposure to liability. Thus what would count as the costs of an activity would vary widely. As a result, the scope of each person's right to security would depend on the decisions of others. The idea that people should bear the costs of their activities would be replaced with the very different and less appealing idea that people should do the best they can—at whatever they choose to do.

According to the objective conception of fault, each person is expected to take into account the costs her action may impose on others. Thus, the question is not whether I am being careful given the risk of what I am doing, but whether I am being appropriately careful in light of my neighbor's interests in security and mine in liberty. The importance of my particular activity enters into defining the appropriate degree of care, not by holding me to a standard appropriate to the activity, but in fixing the degree of liberty appropriate to those engaged in that sort of activity.

Only this conception of fault can provide an objective measure of the costs of my activity that will enable us to honor the liberal principle of fairness that one should bear the costs of one's own activities. To hold me only to taking such precautions as are reasonable or cost-justified for those engaging in that activity would mark a move back to a subjective standard and hold others' security hostage to my choice of activities. Rather than protecting each equally from the others, such a rule would surrender security to an unlimited liberty interest in choosing activities, however dangerous, provided one took precautions customary to that activity. This would be a minor variant on limiting liability to intended consequences. Because the standard of care protects both liberty and security and is supposed to respect equally our interests in both, we cannot avoid looking at the activities themselves. The same logic that requires that we look to degrees of care at all requires us to look to the values of those activities. Judgments of what conduct is at fault or unreasonable involve both.

26. Both liberty and security interests are typically described broadly. For example, a defendant has an interest in walking, not in walking to some particular place.

Talk about objective standards makes many theorists uneasy. Critical theorists of one stripe or another doubt the very possibility of objectivity, and economic analysts, moved by certain views about interpersonal comparability of utility, have been inclined to accept only subjective evaluative notions. A purely subjective account of value, however, cannot honor the principle that one should bear the costs of one's activity, for it allows individuals to determine, by their relative evaluations, what those costs are. Others may be troubled by the concept of objectivity because the idea calls to mind the thought that such standards are somehow eternal and exist quite apart from questions about which interests people have and how important they are. Any such conception of objectivity might well be suspected of being little more than a smokescreen for interests that are already well entrenched.²⁷

But I mean something considerably more modest. Precisely because the fault standard turns on substantive views about the importance of various activities, its contours will always be open to debate. It is objective in a negative sense inasmuch as it is not subjective; that is, the limits of liability are not fixed by the views, interests, or abilities of any of the parties to a tort action. Instead, it protects the interests in both liberty and security that everyone is assumed to have. On the basis of those interests, it asks whether a reasonable person is entitled to have a particular interest protected.

The importance, and even existence, of particular interests is often controversial, and the common law has sometimes been indifferent to what now seem significant interests and concerned about insignificant ones. Clear examples of such indifference can be found in the absence, until recently, of any legal recognition of the interest that individuals have in being free from sexual harassment in the workplace. But the appropriate response to such indifference is to move to a more nuanced objective standard, not a subjective one. New causes of action for sexual harassment have developed in just this way.²⁸ Rather than allowing the victim to be the sole judge of the costs of the harasser's activities, such torts import a "reasonable woman" standard, which aims to recognize both the (potential) harasser's interest in self-expression and the (potential) victim's interest in being free from behavior she perceives as inappropriate. The standard is objective in that it divides the risk between the parties, allowing both the

27. See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215-34 (1989) (criticizing objectivity in sex discrimination law as fostering inequality between sexes because sexes not similarly situated when men have traditionally sexually objectified women). For a discussion of MacKinnon's views, see Sally Haslanger, *On Being Objective and Being Objectified*, in A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 86-87 (Louise M. Antony & Charlotte Witt eds., 1993) (conceding that objectivity perpetuates inequalities, but arguing that objectivity, while gendered, is not purely masculine).

28. Although these are typically statutory rather than tort based, they turn on all of the same issues of reasonableness.

possibility that the plaintiff is being too sensitive and that the defendant behaved inappropriately though in good faith. Exactly where the line is drawn depends on the importance of those two interests—a matter that is sure to be hotly contested. Recent feminist scholarship and advocacy have influenced our views about the appropriate boundaries of both sensitivity and good faith in such circumstances. What they have changed, however incompletely, are views about the costs of various activities and who should bear them.²⁹

To sum up: in this Part I have tried to illustrate how deeply woven are the connections between legal practice and legal theory—even very abstract legal theory. One does not have to be a legal theorist to believe that tort practice would be enhanced by fitting different bodies of tort law to appropriate liability rules. Determining which rules fit which body of law best depends on a defensible conception of the goals of tort law: that is, an account of the aim or point of imposing liability for loss. Though I am not an advocate of economic analysis, I presented an argument for an economic conception of the goals of tort liability: liability rules should aim to reduce accident costs and the costs of avoiding accidents. The defense of that claim invokes low-level theory of the sort that is prevalent in the law school curriculum. I was not content to stop at this point, in part because my view is that even this low level theory implicates much longer theoretical issues that cannot be avoided. In this case, central to economic analysis and to tort law itself is the concept of the cost of an activity. If we want to minimize or internalize an activity's costs, we must have some idea of what the costs are. I have denied that we have a natural (scientific or quasi-scientific) conception of an activity's costs.

29. See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1197-214 (1989) (noting that certain types of sexual harassment, including sexual derision and prominent displays of pornography, are unrecognized under Title VII); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 841-42 (1991) (advocating reasonableness standards that recognize seriousness of women's interests and limited importance of men's interest in harassment). As Estrich points out, the danger is that the wrong objective standard will be applied. *Id.* at 843; see also *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (using reasonable woman standard to judge sexual harassment and creating fault standard of offensiveness to women). Despite the court's claim that the standard is "not fault based," its reasoning plainly is. Robert S. Adler and Ellen R. Pierce argue that a reasonable woman standard must be unfair because it may hold men liable even though they are trying their best. See Robert S. Adler & Ellen R. Pierce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 826-27 (1993). On my interpretation of objective standards, any standard that protects people equally from each other may make someone liable for harms they unwittingly cause. The alternative is to make one person's well-meaning indifference the measure of another's interests. My account also avoids the alleged difficulties with reasonableness standards bruited by Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990) (arguing that reasonableness standards necessarily reflect what is typical in society).

Rather, I have argued that the concept of cost is thoroughly normative. In developing this line of thought, I argued against identifying the cost of an activity with its actual or intended causal consequences and implicitly raised doubts about the principle of strict liability—at least as it is commonly understood. In its place, I argued that the concept of a cost requires the idea of boundaries between activities. These boundaries are normative, not spatial. They are to be understood in terms of duties, and in tort law boundaries are expressed by the fault principle. Moreover, I argued that this conception of fault must be objective if it is to honor the principle that each person must bear the costs of her activity. Part of what the claim that fault is objective means is that one's duties to others depend on the actual value of the activities in which individuals are engaged. It cannot depend entirely on how particular individuals regard those activities. Thus, at the most fundamental level, we cannot separate actual tort law from the most pressing, controversial, and substantive concerns of political philosophy. It is not just that tort law is *enhanced* by theory; in fact, tort practice is *impossible* without it. Recognizing that fact, we have no option but to reflect on those issues of political philosophy: to make the implicit theoretical claims explicit and subject them to the scrutiny of legal theory. The most basic goal of tort law—making it better—turns out to involve the deepest, most controversial questions in political philosophy—often in unexpected ways.

VII. LAW AND COERCION

As I noted previously, in addition to contributing to better legal practice, theoretical reflection about law is a component of an examined professional life as a lawyer. The law is an instrument of coercion. It requires certain types of conduct and prohibits others. Individuals are incarcerated, their liberty taken from them. Others have their resources involuntarily transferred—all in the name of the law. What is the moral basis of law's claim to authority? What justifies the use of coercive force on behalf of this claim to authority? The lawyer who fails to explore or to reflect on these issues dishonors legal practice; worse, perhaps, he fails fully to understand that practice.

The reflective lawyer may never reach a fully settled view of these issues, deciding once and for all time that the coercive use of power, and his role in implementing it, has been adequately defended. It is even less likely that the typical law student will have settled views on these matters. Theoretical reflection in the classroom does not provide an answer but a framework within which a reflective lawyer will contemplate these matters over the course of his life in the law.

The measure of a good jurisprudence course is that it raises precisely the right sorts of questions. For example, the law necessarily claims author-

ity. What does this claim to authority amount to and what are the conditions, if any, under which it would be true? Is the law's claim to authority undermined by legal indeterminacy? Does the claim to authority presuppose a kind of objectivity? Is law merely an instrument for enforcing pre-existing power relationships that systematically disadvantage women, people of color, and other groups?

Fortunately, not every course will invite reflection on these issues in the same way or at the same level of abstraction. That would make legal education a bit too serious and disquieting, not to mention "heavy." Any course, however, in which the instructor invites her students to explore the theoretical or conceptual foundations of a body of law raises precisely these questions—albeit in a somewhat more concrete form. I want to consider how these questions might be raised and explored in the tort context.

VIII. ECONOMIC ANALYSIS AND AUTONOMY

Liability in torts is either strict or based on a principle of fault. Under strict liability an injurer is liable to her victim whether or not she is at fault. It is enough (more or less) that the injurer's conduct be the cause of the victim's loss. In fault liability, in addition to a causal connection between the injurer's conduct and victim's loss, a victim's claim to repair can be sustained only if the harm of which he complains is owed to the injurer's fault. When a plaintiff brings a suit to recover compensatory damages, he is requesting that the law use its coercive power to transfer resources from the injurer to him. Arguably, the state can coercively enforce a wealth transfer only when doing so is either required by justice or by some other principle, the execution of which is not inconsistent with the requirements of justice. Therefore, his claim in part is that the state would be justified in using its power to redistribute wealth to him and from the injurer.

This creates a problem for the economic analysis of law. Under economic analysis, the victim's claim to redistribution is a claim to coerced redistribution. In economic analysis, redistribution (or anything else for that matter) is justified only if it is efficient or required by an efficient practice. A justified claim to redistribution, then, is logically independent of whether the person who advances it has been the victim of another's misconduct. In contrast, a claim in tort is a claim for repair or compensation; that is, a claim to redistribution that presupposes that the victim has been wronged by the injurer. Whereas tort claims are essentially about the relationship between injurer and victim, claims to redistribution based on redistribution's effects on cost avoidance are not. Economic analysis, therefore, appears to misunderstand the nature of the claim to redistribution that is at the center of tort law. Economic analysis inadequately represents what is essential to tort practice. That is part of the reason that I have

criticized economic analysis's claim to being a plausible *descriptive* account of tort practice.³⁰

If economic analysis perverts our ordinary understanding of a claim made in tort, perhaps we should reinterpret economics as a prescriptive theory about how those claims should be understood. The ordinary understanding is that in the typical case, a victim makes a claim for repair of a loss that she alleges is another person's responsibility. In doing so, her claim requires both a prior wrong and a moral duty to repair it based on a principle that those who wrong others have a duty to repair the losses for which they are responsible. Perhaps we should understand that the economist is urging us to reconsider this interpretation in the light of economic theory. Rather than being the fundamental concepts in tort law, the concepts of responsibility, wrong, and repair gain their significance in relation to the role they play in an economic model. In this view, tort liability based on concepts like responsibility, wrong, and repair is likely to produce efficient outcomes. In effect, economic analysis treats our ordinary understanding as elliptical for the more precise economic one, but it offers us no reason for thinking that the ordinary understanding is wrong or misleading, other than by assuming that an economic interpretation is correct.

Usually a reformist impulse is warranted when our ordinary understandings fail to illuminate or explain data. But there is no reason to think that our ordinary understandings of responsibility, wrong, and fault—even if they are not fully analyzed—fail to explain our tort practice or why it is that the state is justified in enforcing the claims warranted under existing tort rules. In fact, the economist who would reform or recharacterize the concepts and structures central to tort law owes an explanation of why it is that the state would be justified in forcing wealth maximizing or efficient wealth transfers. At the least, this invites the questions: What is the normative basis of efficiency? What justifies the use of the state's coercive powers to promote efficient outcomes? Even if the state were sometimes justified in promoting efficiency through its coercive machinery, would it be justified in using the tort system of private actions as a vehicle for doing so?

Richard Posner is rare among economic analysts for having seen the depth of the problem. It is not enough to treat efficiency as a predictive or explanatory thesis.³¹ If the claim is that efficiency is the best explanation of existing tort practice, then the thought must be that judges are justified in

30. See Jules Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233 (1988) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) and STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987)); see also Stephen Perry, *Tort Law*, in BLACKWELL'S COMPANION TO LEGAL PHILOSOPHY (Dennis Patterson ed., forthcoming 1995).

31. My view is that economic analysis probably has significant predictive value, but fails as both an explanatory and normative theory of tort law.

reaching decisions in a way that maximizes wealth by reducing accident costs. More important, from our current point of view, if efficiency were both a good explanation of existing practice and a bad or indefensible ground for exercising the state's coercive authority, we would have grounds for worrying about whether this part of the law could be defended and whether lawyers could legitimately allow themselves to be employed in the service of an indefensible legal structure. It is that question that concerns us most here. Answering, or even reflecting on it, requires an inquiry into tort law's normative, not just its positive, foundations.

With this in mind, Richard Posner has attempted to ground efficiency in some moral ideal that makes sense of the victim's claim to repair as being an expression of the ideal of justice. In other words, he has tried to develop the connection between efficiency and ideals of justice.³² Most economists would have been satisfied to defend efficiency on utilitarian terms, conceiving of efficiency as a modern day version of classical utilitarianism purged of its unhappy reliance on interpersonal comparability of utilities. Posner demurs. He finds utilitarianism itself indefensible, so he cannot rely on it. Instead, he defends efficiency on, broadly speaking, autonomy and contractarian grounds. Rational parties would agree to arrange their institutional lives in ways that maximize wealth. Maximizing wealth requires minimizing the sum of accident and accident avoidance costs. The victim has a claim to redistribution because both she and the injurer would have agreed *ex ante* to a rule of liability that supports such a claim when enforcing it would be wealth maximizing.

Many theorists, Anthony Kronman, Ronald Dworkin, and myself among them, have expressed doubts about the nature of Posner's enterprise and its possibilities of success.³³ Some have doubted whether the principle of autonomy or choice as expressed in the contractarian framework would support a principle of efficiency, while others have worried about the claim that efficiency is itself something of political or moral value. Both kinds of concerns are important from our point of view because they express doubts about the extent to which a tort practice conceived of in purely economic terms could justifiably call upon the state's coercive machinery.

IX. AUTONOMY, AGENCY, AND RECIPROCITY

Many who doubt the connection between autonomy and efficiency, however, accept the view that in order to be just tort law must enforce or

32. Richard Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243 (1980).

33. See JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* (1988); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381 (1992); Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978).

protect individual autonomy. The problem is to define the relevant conception of autonomy and to develop the ways in which tort law protects or enforces it. In this regard, perhaps the most important works in tort theory are Richard Epstein's *A Theory of Strict Liability*³⁴ and George Fletcher's *Fairness and Utility in Tort Theory*.³⁵

Let me put the problem this way: there are several central features of our tort practice that call for explanation and justification. First, there is the bilateral, injurer-victim nature of litigation. Then there is the emphasis on injurer responsibility, causation, fault, and the like. Economists explain these features in terms of the contribution they make to efficiency. I have already raised doubts about this kind of strategy—here and elsewhere.³⁶ Then there is the question of why promoting efficiency would justify state coercion. Most economists are skeptics about value, other than about the value of efficiency. So they have not seen fit to address this question, choosing instead to treat economic analysis as a predictive or descriptive theory.

Posner is an exception. He presents a normative argument for efficiency based on autonomy. The implicit claim is that the state would be justified in enforcing an arrangement that gave expression (in the appropriate way) to the principle of autonomy.

Posner's critics reject the link between efficiency and autonomy. Some, Fletcher, Epstein, and myself, for example, accept the basic principle that a tort law that gave adequate expression to an appropriate conception of autonomy would be justifiable. In our case, we have to specify an appropriate conception of autonomy and explain the ways in which existing tort law gives expression to that conception. (Of course, to make our arguments complete, we would also have to defend the claim that autonomy as expressed in tort law is connected to the claims of justice in a way sufficient to justify the state's coercive machinery.)

How have Fletcher and Epstein sought to develop the connection between autonomy and tort law? We might begin answering this question by noting first that their most influential essays were written in the early 1970s in the face of an emerging economic analysis of tort law and before the full development of the critiques of its foundations. Epstein and Fletcher were writing against the prevailing economic conception of tort law. In this conception, the idea of negligence or fault had been reformulated in the light of the famous Learned Hand test as an expression of economic inefficiency. According to the Hand formula, to say that someone is at fault is not to blame him or to treat him as having acted in a morally culpable way; rather, to be at fault is to fail to take cost-justified precautions.

34. RICHARD A. EPSTEIN, *A THEORY OF STRICT LIABILITY: TOWARD A REFORMULATION OF TORT LAW* (1980).

35. George P. Fletcher, *The Search for Synthesis in Tort Theory*, 2 J.L. & PHIL. 63 (1983).

36. See Coleman, *supra* note 30.

Negligence is inefficiency, nothing more. Liability imposed on the basis of fault is liability designed to discourage inefficiency.³⁷

In addition to this reinterpretation of negligence, economic analysis is grounded on the Coasian claim that in the typical accident case causation is reciprocal. When the rancher's cows trample the farmer's corn, both activities causally contribute to the accident's occurrence. If the state allows cows to roam without imposing the costs to the farmer on the rancher, it harms the farmer relative to the rancher. If, however, the state forces the rancher to bear the costs his cows impose on the farmer, it harms the rancher relative to the farmer. Whether or not one party is harmed depends on the action of the state. The question is not, therefore, "who harms whom?" Rather, it is "which harm should we allow?" The answer depends not on causation, but on a scheme of entitlements. If the rancher is entitled to let his cows graze, then the farmer is harmed. If the farmer is entitled to preclude cows, then the rancher is harmed. Causation cannot be a basis of entitlement, because it presupposes that entitlement decisions have already been made, and entitlement decisions are themselves based on our goals. If the goal is the efficient allocation of resources, then we should simply treat both activities as if they were owned by the same person. We then ask how much of each activity a person would pursue. That is the efficient allocation of resources for which we should aim in designing our scheme of entitlements and liability rules. Coase is credited with, among other things, showing that under certain conditions, an efficient allocation of resources will result regardless of the initial assignment of entitlements. For our purposes, the more important insight is that in determining the relevant rights and liability rules, we do not engage in a causal inquiry.

The twin tenets of the economic analysis against which both Epstein and Fletcher were writing, then, are the social utility or efficiency interpretation of reasonableness (and, as a corollary, the standard of negligence) and the rejection of causation as a ground of liability. Both tenets are apparently inconsistent with an emphasis on human autonomy. We cannot take autonomy seriously if the extent to which a person is entitled to engage in an activity is held captive by the extent to which what she does is deemed *socially useful*. The entire point of autonomy is that it is constrained only by other claims to autonomy, not by claims imposed by a calculus of social

37. This economic reformulation of negligence makes sense in a way in which the claim to repair as a claim to a cost-minimizing wealth transfer does not. In the latter case, the economist provides no reason for thinking that the ordinary interpretation of the claim to repair cannot be understood on its own terms. In contrast, by the time economists seized on the Learned Hand formulation of negligence, there was reason for thinking that alternative explanations of negligence or fault would not do. For example, the view that negligence marks some moral fault in the actor had been discredited by the line of cases that begins with *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837).

value or usefulness. By the same token, the other core component of autonomy is human agency. Without a working, meaningful conception of causation there can be no notion of autonomy because there can be no notion of responsibility. There can be no notion of ownership, no way of saying "this is mine; this is what I have done."

To treat autonomy seriously, one has to reject both tenets of economic analysis; and that is precisely what Epstein and Fletcher do, each in his own (very different) way. For Fletcher, if tort law is to respect autonomy, then it cannot adopt principles of liability by which an injurer's liability depends on the reasonableness of the activities in which she is engaged and the reasonableness of the risks associated with those activities. Instead, a person's liability should be fixed by whether the risks she imposes are nonreciprocal. Nonreciprocal risks differ in degree and kind from those risks the victim imposes on others. The victim has a right to recover only if he has suffered a loss owing to the nonreciprocal risk taking of the injurer. The injurer has a duty to repair the loss if she imposes nonreciprocal risks without an excuse for doing so.

According to Fletcher, there is an important connection between the concepts of autonomy and nonreciprocity of risk. Fletcher claims that the principle of reciprocity of risk can be derived from a variant on John Rawls's first principle of justice. Roughly, Rawls's first principle is that each person is entitled to the maximum degree of *liberty* compatible with a like liberty for all. Fletcher does not attempt to derive the principle of nonreciprocity of risk directly from this principle of justice, nor is it obvious how one might set about doing so. Instead, Fletcher's view is that nonreciprocity of risk falls out of the very different "principle" that each person is entitled to the maximum degree of *security* compatible with a like security for all.

As I have pointed out before, even if nonreciprocity of risk can be derived from this principle, the principle itself hardly reflects a normatively attractive ideal, let alone a demand of justice. After all, the principle that each person is entitled to the maximum degree of security compatible with a like security for all can be satisfied by a maximally proscriptive state in which no one is allowed to do anything. That state of affairs is not only unjust; it has painfully little to do with securing or enhancing autonomy.

Understood in the way it usually is, Fletcher's argument is a nonstarter, and most theorists have rejected it. I want to reinterpret his argument, however, in a way that brings out a connection between reciprocity of risk and autonomy that otherwise appears unavailable.³⁸ Instead of claiming

38. This principle of charity in interpreting Fletcher's argument is not one he appears committed to—at least in interpreting my view. For an extremely unsympathetic and largely confused reading of my view, see George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658 (1993).

that the "maximum compatible security principle" is a requirement of justice, whether by analogy to Rawls or through some other means, we should treat it as an invitation to specify a circumstance under which individuals would have something like a maximum degree of security compatible with a like degree of security for all. In other words, imagine a circumstance in which (in the absence of a state) each person had the maximum degree of security given a like degree of security for all others. We can then use this as a normative point of departure in something like the way in which Hobbesian contractarians employ the state of nature.

Here is one such circumstance. Everyone is alone in his home and does not go outside. No one imposes any risks on anyone else, and each person experiences the maximum degree of security compatible with a like security for others. This is a normative point of departure. Given this point of departure, we can suppose that someone leaves his house and ventures out into the world. In doing so, our venturer now imposes risks on others he did not impose while in the confines of his house. With respect to the others, all of the risks he imposes are nonreciprocal. They impose no risk on him, but he imposes risks on them. If in the course of engaging in his activity he should injure one of them, he would be liable. In a sense, he has chosen his liability. It is his voluntary action of leaving the house that creates his exposure to liability.

Now suppose another person leaves her house. With respect to everyone who remains in their houses, she imposes nonreciprocal risks and, thus, in the event of harm, will be held liable. Again, her liability is, in a sense, something she has chosen. With respect to the other person who has ventured out of his house, however, this individual may be imposing reciprocal risks. In the event of an injury between the two of them, no liability would ensue.

Just because someone has ventured out does not mean that she subjects herself to all levels of risk. She is subject to that level of risk which she imposes on others who have ventured out. With respect to others who have ventured out, she is in the same position as those who remain in their houses are with respect to one another. She can recover from anyone who imposes nonreciprocal risks on her. Those individuals have chosen activities with even greater levels of associated risk, and in doing so they have chosen to increase their exposure to liability. They can reduce their exposure simply by reducing the riskiness of their activities. In the hypothetical above, this can be done by going back into the house. The key point is that we can understand liability in tort as a choice, as the expression of a voluntary action.³⁹

39. We can then distinguish between fault and strict liability. Strict liability cases are like those in which one party ventures out from his house and imposes risks on others who are still at home. Suppose, however, that many individuals have left their homes and are

Richard Epstein shares with George Fletcher the commitment to autonomy as a way of understanding tort law. In Fletcher's case, the important connection is between autonomy and reciprocity of risk. It is worth noting that in trying to make good this connection, Fletcher engages in some of the same reformulation economists do. Instead of being central to tort practice, fault becomes just one way of imposing nonreciprocal risks. In Epstein's case, the important connection is between autonomy and causal responsibility. Causation provides the connection to autonomous agency that the Coasian view severs. Interestingly, in trying to make good his claims about the relationship between tort law and autonomy, Epstein goes further in recharacterizing tort law's basic concepts than either the economists or Fletcher do. He does not reinterpret fault (as either inefficiency or nonreciprocity); he drops it altogether!

According to Epstein, we can identify several paradigm cases of causal judgments in which it is both true that the injurer caused the victim's loss and this fact is enough to establish a *prima facie* case for holding the injurer liable to his victim. Epstein considers four such cases: force, fright, compulsion, and setting dangerous conditions. When A forces, frightens, or compels B in a way that harms B, it makes sense to say that A causes B harm. More important, in such cases it makes sense to say that A has a *prima facie* duty to repair B's loss.

As I have argued elsewhere in this essay, I have significant doubts about this last claim, but I do not want to focus on those doubts here.⁴⁰ Rather, I want to explore some of the ways in which the principle of causation can be understood as giving expression to the moral principle of autonomy. Let's consider two of these: one Hegelian, the other Lockean.

The Hegelian view suggests that we should understand tort law as follows. Suppose that I injure you. If your injury is the causal consequence of my agency, then your loss is really mine; I own it. I cannot literally take it back, even if it is mine. What I can do is pay you for it and thereby recapture it: make it mine. If I injure you, I have to compensate you for your loss, not in order to make you whole or because you have a right to repair against me. Rather, I have to compensate you in order to reclaim what is mine: the loss that "rests" with you but is really mine.⁴¹ This is a

engaged in substantial reciprocal risk creating activities. Those who remain at home can recover against these others on a strict liability basis. Those involved in mutually risk-creating activity cannot recover against one another unless one of them acts in an unusually risky manner. That level of risk above the background risk is represented by the fault or negligence standard. Fault is nonreciprocal risk taking among individuals, all of whom are otherwise engaged in reciprocal, if substantial, risk imposing activities.

40. See discussion *supra* Parts V-VI.

41. Herbert Morris has argued for a very similar view about punishment for criminal mischief. In his view, it is not that the state has a right to punish the wrongdoer who deserves to be punished. Rather, the wrongdoer has a right to be punished. Herbert Morris, *Persons and Punishment*, in *CRIMES AND PUNISHMENT* (Jules L. Coleman ed., 1994).

sense in which causal responsibility is a component of the concept of human agency. It suggests a way of understanding tort liability that eliminates the role of fault while at the same time rooting liability in a moral conception of the person.

The Lockean conception of the role of autonomy has both a positive and a negative dimension. Each of us has a natural right to exercise our freedom (the positive dimension), provided we do so within the constraints imposed by the autonomy of others (the negative dimension). Each of us, in other words, has a set of moral boundaries. Our autonomy is limited only insofar as we are not free to cross the borders that define the protective moral spheres of our neighbors. Boundary crossings are violations, and should harm ensue, compensation is owed. Again, what matters is that a boundary is crossed. The injurer need not otherwise have been at fault. Even innocent crossings are invasions in this sense. What matters is the fact of crossing, not the culpability of the invader. Autonomous, not culpable, agency is the basis of liability. Thus, the role of fault in liability is de-emphasized under the Lockean view as well.

Although both the Lockean and the Hegelian conceptions of autonomy support a system of strict liability in which the important relationship between injurer and loss is the causal one, they represent very different explanations of why liability is justly imposed on an injurer whose autonomous agency leads to another's loss. In the Lockean model, the loss is the result of a boundary crossing. A boundary crossing is itself a violation. The injurer has thereby wronged his victim, who has a right to the security of her boundary. Liability is repair for that wrong; it is the victim's right. In the Hegelian model, the injurer compensates the victim, not because he has wronged her, but in order to reclaim the loss that is his. It is the injurer's right that is enforced by a scheme of liability, not the victim's.

These are not the only normative foundations for the scheme of strict liability on which Epstein relies to defend the principle of autonomy in tort law. Sometimes he appeals to what I would call the "equilibrium principle." Consider two persons, A and B. Prior to A and B being involved in an accident, there is a sense in which there is an equilibrium between them. When A injures B, she is responsible for upsetting that equilibrium, and thus has to make good B's loss in order to make things right—in order, in other words, to re-establish the pre-existing equilibrium. Again, it is no part of the case for recovery or liability that A is at fault. All that matters is that A's causal agency has upset the balance between them.

Finally, Epstein adopts what I referred to in earlier sections of this essay as the principle of fairness, namely, the view that it is wrong for individuals to displace the costs of their activities onto others. The idea is this: Suppose I engage in an activity for my own benefit, and in the course of doing so I injure myself. It does not seem plausible that I should be able to present you or anyone else with the bill for my injury. If that is so, I have

no grounds for compelling you to bear those costs if in the course of engaging in the same activity I happen to injure you. Those are costs of my activity. They are my costs to bear, not yours. It is unfair of me to displace these costs onto you or anyone else.

The points I want to emphasize have little to do with whether Fletcher, Epstein, or the economists are right about the foundations of tort liability. Readers familiar with my views know that while I think there is something to be said on behalf of each of these positions, the right way to think about tort liability is in terms of the principle of corrective justice.⁴²

Notice that in both Epstein's and Fletcher's arguments the way to save the connection between tort liability and justice is through the principle of autonomy. Neither is altogether clear about how to understand autonomy, however. What is clear is that in each case autonomy precludes judgment about the relative values of the activities in which the parties engage. For Epstein, liability depends on causation, and causal judgments are independent of the particular activities in which the parties are engaged. For Fletcher, liability depends on nonreciprocity of risk. The nonreciprocity of a risk depends on the degree and kind of risk, not on the value of the activities.

I have argued that it is not possible to identify the costs of an activity in a way that is neutral with respect to the values of the various activities in which people engage. This means that none of the arguments we have considered so far can fully explain or justify existing tort law. The problem that remains is to provide a conception of the cost of an activity that makes room for the role of autonomy in a theory of liability while recognizing the essential normative nature of costs.

The arguments in this part of the paper are therefore connected. The very possibility of tort law presupposes an account of the nature of the cost of an activity. Legal practice cannot do without legal theory in that sense. If my view of the costs of an activity is the correct one, the costs of an activity will depend on the substantive duties we owe one another. That one activity imposes costs on another cannot be the basis of determining the duties owed by those who engage in it, because whether the costs belong to one activity or the other depends on what those duties are. More important, I have argued that the costs of activities must be determined objectively. That means, among other things, that the costs of activities depend on their actual value: how they matter in human lives and why.

On the other hand, I have also suggested that actual tort practice can legitimately call upon the state's coercive machinery only if in doing so it respects or enhances human autonomy. That is one reason for rejecting economic analysis as a defense of existing practice. Unfortunately, the best-known attempts to explain tort liability in terms of autonomous agency

42. Cf. JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

(Epstein's and Fletcher's) are also apparently committed to the idea that we should understand autonomy in an activity-neutral way. What matters is not in which activity the injurer engages, but whether in doing so, he imposes nonreciprocal risks (Fletcher) or causes another harm (Epstein). Neither of these accounts, however, can meet the requirements imposed by the concept of an activity's cost that I have already developed. The task that remains, then, is to develop an account of the normative foundations of tort law that justifies its use of power as required in order to respect or enhance human autonomy, but which does so in a way that is consistent with the objectivity of the concept of an activity's cost. I take *that* to be my task in developing a substantive tort theory: a task I have only begun to undertake in *Risks and Wrongs*.

For now, it is enough to note that tort theory is no useless, self-indulgent activity among a group of self-important law professors disengaged both from tort reform and existing practice. Nor is the only kind of legal theory appropriate to the reformer or the reflective lawyer the rather low-level variety that one can pick up from a nutshell text. The problems of reform and the invitation to serious reflection invite a much deeper and, in a sense, more abstract kind of theorizing. Not everyone is capable of such theorizing, nor need everyone have a taste for it. Still, it would be a tremendous mistake to demean it or to misunderstand its importance to both practice and a reflective professional life in the law.

